

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

DONALD C. & NANCY H. NALLE

Petitioners

Donald C. and Nancy H. Nalle

For the Petition

Wright Jolly, Jr.

Department of Housing and
Community Affairs

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Board of Appeals No. S-2825
(OZAH No. 12-14)

Report and Recommendation by: Tammy J. CitaraManis, Hearing Examiner
Hearing held by: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

In Petition No. S-2825, Donald C. and Nancy H. Nalle seek approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 18448 Cape Jasmine Way, Gaithersburg, Maryland. The legal description of the property is Lot 104, Block J, in the Flower Hill Subdivision, and is shown on Tax Account No. 02362861.

On September 23, 2011, the Board issued a notice of a public hearing before the Hearing Examiner for February 9, 2012. Exhibit 11(b). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report dated January 26, 2012 (Exhibit 13), recommended approval of the special exception, with six (6) conditions.¹

A Housing Inspector from the Department of Housing and Community Affairs (DHCA) inspected the property on January 12, 2012. Housing Code Inspector Wright Jolly reported his findings in a memorandum dated January 30, 2012 (Exhibit 14). In an e-mail to the Hearing Examiner dated February 6, 2012 (Exhibit 16), the inspector concluded that occupancy must be limited to a family of four or two unrelated persons, in habitable space of 798.67 square feet.

The hearing went forward as scheduled on February 9, 2012, and Petitioners appeared *pro se*. Petitioners produced a copy of their deed (Exhibit 18) and executed an affidavit of posting (Exhibit 17). Both testified in support of the petition and agreed to meet all the conditions set forth in the Technical Staff Report (Exhibit 13) and the housing inspector's report. (Exhibit 14) No opposition appeared at the hearing.²

¹ The Technical Staff report is frequently quoted and paraphrased herein.

² One letter of opposition dated September 24, 2011, from Paul and Barbara Cencula of 18416 Cape Jasmine Way, was received and entered into the record as Exhibit 12.

Housing Code Inspector Wright Jolly testified on behalf of DHCA. The Inspector re-inspected the property on February 7, 2012, and confirmed that the issues noted in his January 30, 2012, report had been resolved. Tr. 16³

The record was held open until February 23, 2012, to allow Petitioner time to submit a revised Landscape and Lighting plan which was reviewed and approved by Technical Staff on February 13, 2012. (Exhibits 22 and 26) A Notice of Motion to amend the petition (Exhibit 24) was issued reflecting the revised Landscape and Lighting Plan (Exhibit 26) and was granted as a matter of course (no objection being received). The record closed on February 23, 2012.

For the reasons set forth below, the Hearing Examiner recommends approval of the requested special exception, subject to the conditions set forth in Section V of this Report.

II. FACTUAL BACKGROUND

A. The Subject Property and Its Current Use

The subject property is located at 18448 Cape Jasmine Way, Gaithersburg, Maryland, in the Flower Hill Subdivision, on the west side of Cape Jasmine Way near the intersection of Cape Jasmine Court. The property is an interior lot which fronts on Cape Jasmine Way, contains a total of 7,800 square feet and is improved with a two-story single-family dwelling with a walk-out basement. The property is in the Planned Neighborhood Zone⁴ (PN) as shown on the Zoning Map (Exhibit 13, Attachment 3).

A location map (Exhibit 13, Attachment 1) included in the Technical Staff report shows the location of the subject property on the next page:

³ All transcript citations are to the transcript of the February 9, 2012, public hearing.

⁴ Technical Staff indicated in its report (Exhibit 13, p.5) that the Planning Board approved the site plan for this development on April 21, 1983.

ATTACHMENT 1



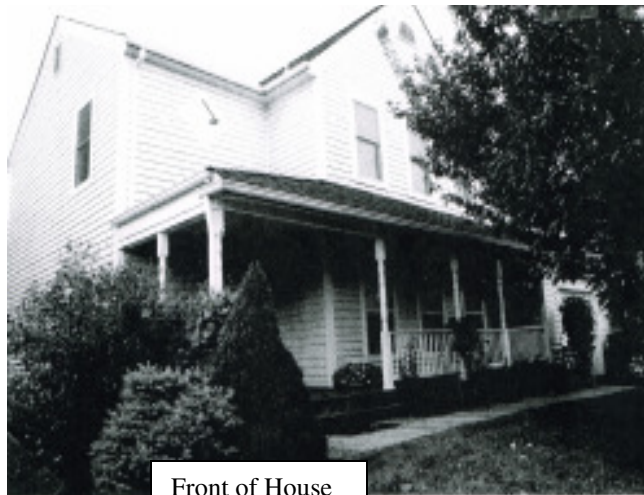
Technical Staff described the property as follows (Exhibit 13, p. 2):

The dwelling was constructed in 1986 and is setback approximately 32 feet from Cape Jasmine Way. The dwelling has a left side yard of approximately 9 feet, a right side yard of approximately 21 feet, and a rear yard of approximately 55 feet. The property consists of 7,800 square feet in the PN zone. The PN zone is a planned unit development zone that allows for uses permitted as special exceptions, such as accessory apartments, in the R-90 zone. The standard lot size for a lot located in the R-90 zone is 9,000 square feet. However, this

subdivision is a planned development that allows for variations in lot sizes in order to preserve open space within the subdivision.

A paved driveway that measures approximately 10 feet wide by 32 feet deep extends from Cape Jasmine Way to the front of the dwelling. There is a one-car garage located on the site. The Tenant will be able to park in the existing driveway, which accommodates at least two vehicles.⁵ Parking is also permitted on both sides of Cape Jasmine Way.

The front and rear of the home are shown below in photographs from the Technical Staff report (Exhibits 9 (a)-(b) :



Front of House
Exhibit 9 (a)

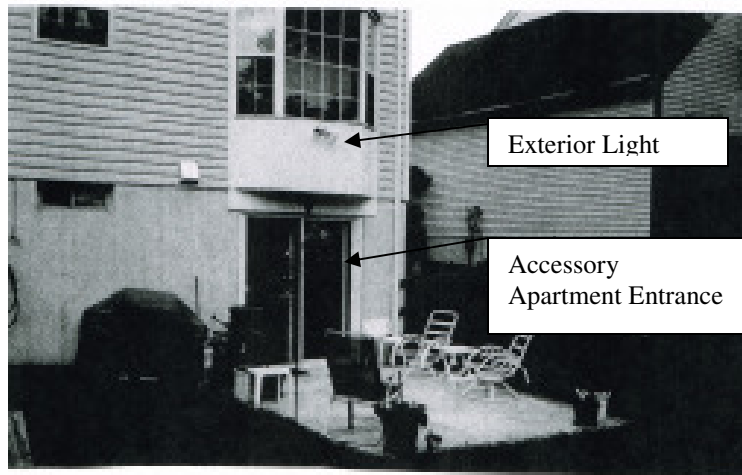


⁵ Technical Staff found that the “existing driveway and garage accommodate a total of three vehicles and is adequate for the accessory apartment.” Exhibit 13. p. 3.



Exterior Lights

Rear of Home – Exhibit 9(b)



Exterior Light

Accessory
Apartment Entrance

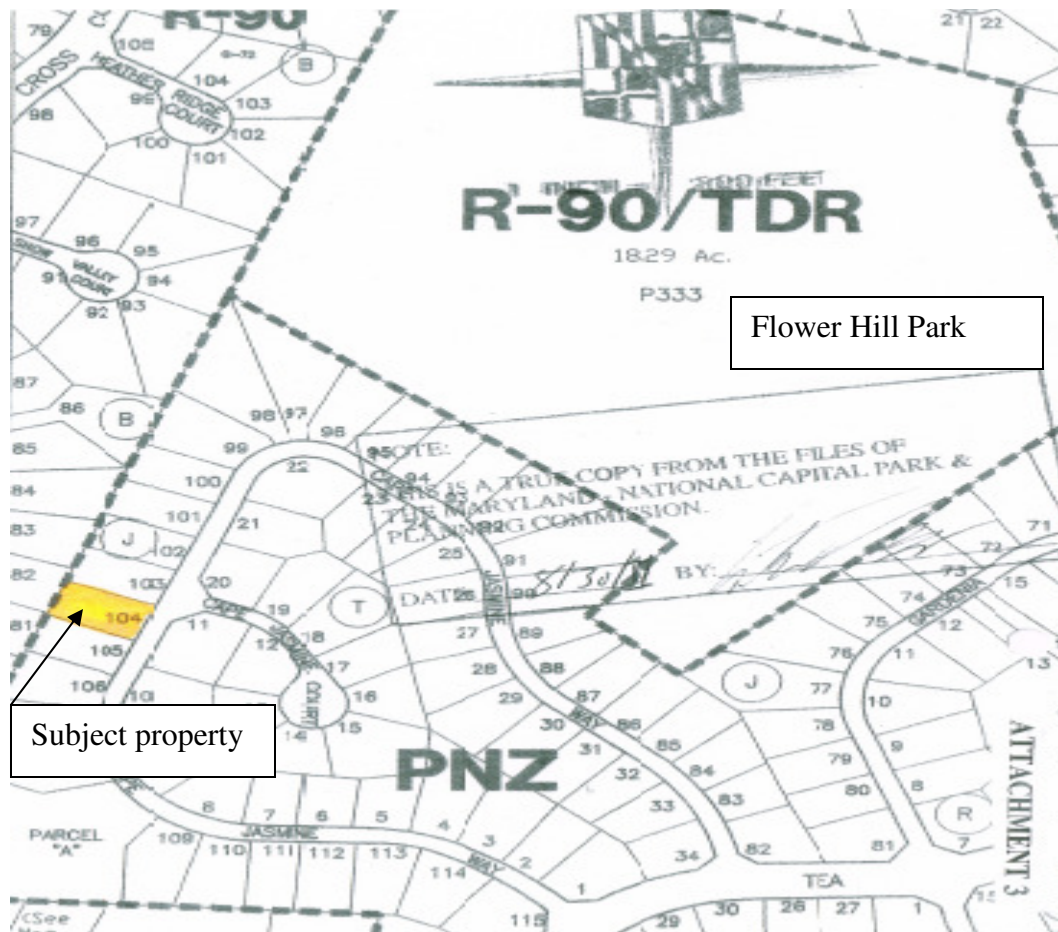
B. The Surrounding Neighborhood

Technical Staff defined the neighborhood by the following boundaries which are accepted by the Hearing Examiner: Flower Hill Park to the north, Gardenia Way to the east, Winter Park Court to the West and Tea Rose Drive to the South. The neighborhood boundary, depicted with a solid line on the aerial map shown below (Exhibit 13,

Attachment 2), has been drawn by Technical Staff to include any nearby property that may be affected by a potential increase in density or traffic:



Technical Staff reports that “[t]he planned neighborhood is primarily developed with single-family dwellings [and] [s]ingle-family detached homes extend to the north and south of Cape Jasmine Way on both sides of the street.” Exhibit 13, p. 3. Properties adjoining the subject property to the west (Winter Park Court) are zoned R-90 and Flower Hill Park to the north is zoned R-90/TDR as shown on the Zoning Map (Exhibit 13, Attachment 3) which is reproduced below:



Technical Staff reported that there are no accessory apartments within the general neighborhood and concluded as follows (Exhibit 13, p.3):

The immediate area surrounding the proposed accessory apartment is not expected to be adversely affected considering that: (1) the accessory apartment is consistent with the residential character of the main dwelling, and (2) adequate off-street parking is available on-site.

The Hearing Examiner concurs with Technical Staff and finds that the addition of one accessory apartment in the general neighborhood will not be excessive or change the residential character of the neighborhood. Exhibit 13, p. 7.

C. The Master Plan

The subject property lies within the *Gaithersburg Vicinity Master Plan 1985 (as amended 1988 and 1990)*. Exhibits 8 and 13. The Plan identifies the Flower Hill District as a residential planned neighborhood development within the Airport Study Area. Plan, pp. 42-47. Technical Staff advises that the “PN zone is a planned unit development zone that allows for uses permitted as special exceptions, such as accessory apartments, in the R-90 zone.” Exhibit 13, p. 2. One of the objectives listed in the Plan is to “increase the county’s total housing stock and concurrently provide an appropriate mix of affordable housing.” Plan, p. 1; Exhibit 8. Technical Staff found the accessory apartment special exception to be consistent with the master plan.

The Hearing Examiner agrees with Technical Staff because the Plan supports the PN zoning which permits accessory apartments by special exception. In addition, this accessory apartment is not visible from the street and therefore doesn’t change the existing structure’s appearance as a single-family dwelling consistent with the surrounding neighborhood. Exhibit 13, p. 3.

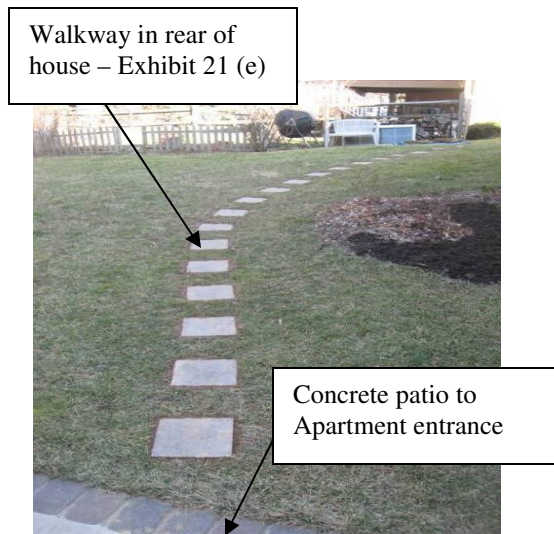
D. The Proposed Use

Petitioners are requesting approval of an existing 798.67 square foot⁶ accessory apartment located in the walk-out basement of their 1, 760 square-foot home.⁷ Petitioners

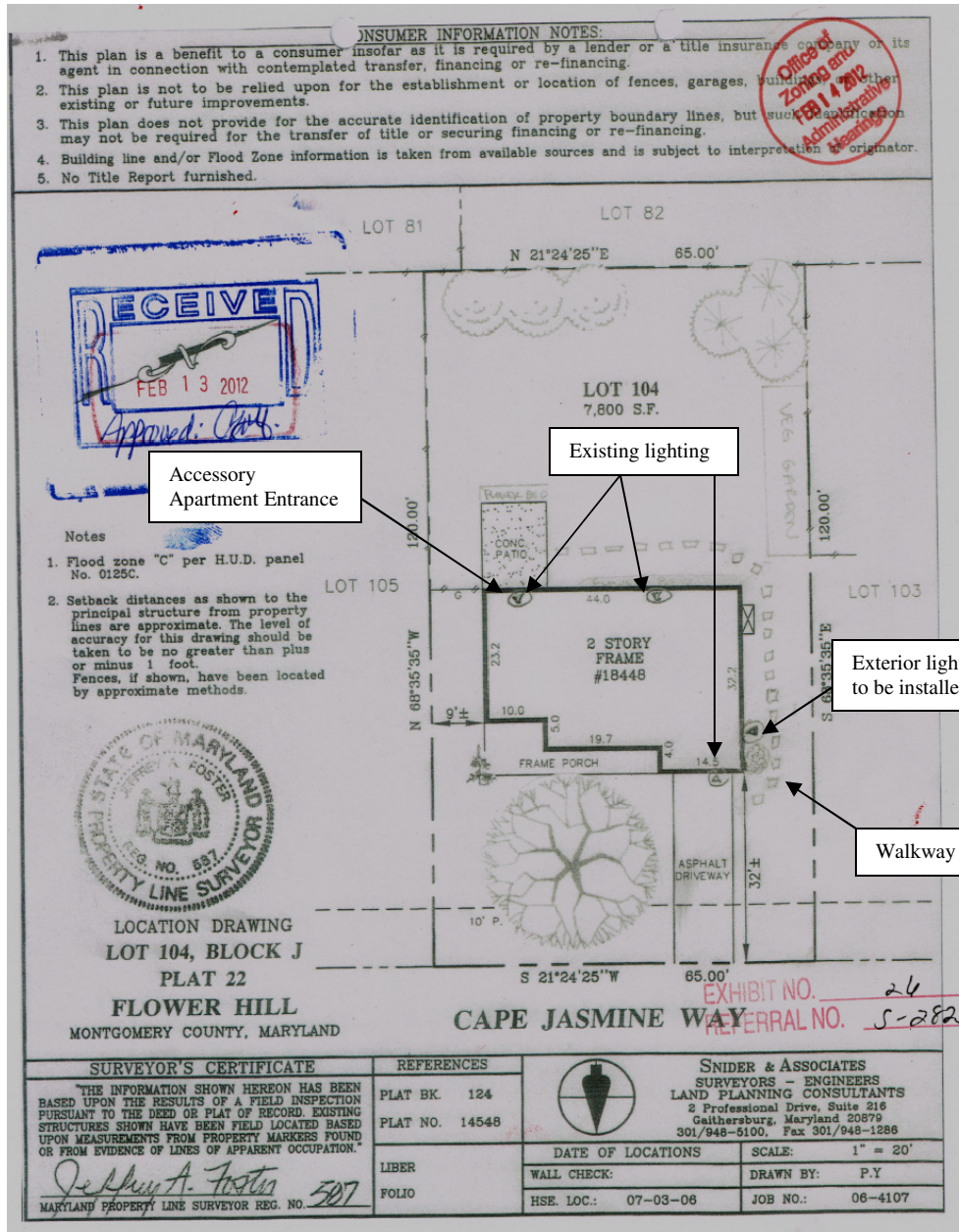
⁶ In their statement in support of their petition (Exhibit 3) Petitioners indicate that the apartment is 657 square feet which is also included in the staff report (Exhibit 13, pp. 1 and 6. However, the Housing Inspector’s measurements of the apartment reveal 798.67 square of habitable space. Exhibit 16. Petitioners also indicated in their statement that the basement was professionally finished in 2004, two years prior to when they purchased the property in 2006. Exhibit 3.

⁷ Petitioner or Technical Staff did not provide the size of Petitioners home (1,760 square feet) as recorded in the State Department Assessment and Taxation (SDAT) records. Because the Zoning Ordinance § 59-G-2.00(a)(9) requires this that the accessory apartment be “subordinate” or less than 50% of the size of the main dwelling, the Hearing Examiner takes official notice of the SDAT records for Petitioners property. Should the Petitioner’s object, they may file an objection during the 10-day period for requesting oral argument before the Board and the Hearing Examiner will re-open the record of the case.

occupy the main dwelling and the basement accessory apartment is currently being rented and occupied by a married couple. Tr.7. Technical Staff reports the apartment is a separate living unit with its own exterior separate entrance (patio door) at the rear of the house where the concrete patio is located, as depicted in photographs (Exhibit 9 (b)) shown on page 6 of this report. Exhibit 13, p. 1. Access to the basement apartment is via a walkway made of concrete pavers along the right side and rear yard of the house (from the driveway to a rear concrete patio) as shown below in photographs provided by the Housing Code Inspector (Exhibits 21 (a), (e)-(g)):



The landscaping and lighting are shown on the revised Landscape and Lighting Plan (Exhibit 26):



Technical Staff reported (Exhibit 13, p. 3):

The major doorways to the subject site are lit at an appropriate residential level. At the front of the house, a light fixture is located at the

side of the main door, at a height of about six feet. A light fixture is located above the garage door and three exterior lights are located in the rear of the dwelling.⁸ The front, side, and rear yards of the property are well landscaped with mature trees, shrubbery, and flowers.

DHCA inspected the property on January 12, 2012. Housing Code Inspector Wright Jolly reported his findings in a memorandum dated January 30, 2012 (Exhibit 14) as follows:

The preliminary inspection was conducted on January 12, 2012. The Accessory Apartment is located in the basement of the house. The issues regarding Accessory Apartment standards are as follows:

1. The Accessory Apartment is being rented and occupied prior to receiving approval from the Board of Appeals and prior to receiving a rental license.⁹
2. Since the house was built in 1986, the owners must install hard wired smoke detectors outside the sleeping areas in the basement and the main dwelling.
3. The wood split rail fence is deteriorated, damaged and in disrepair.

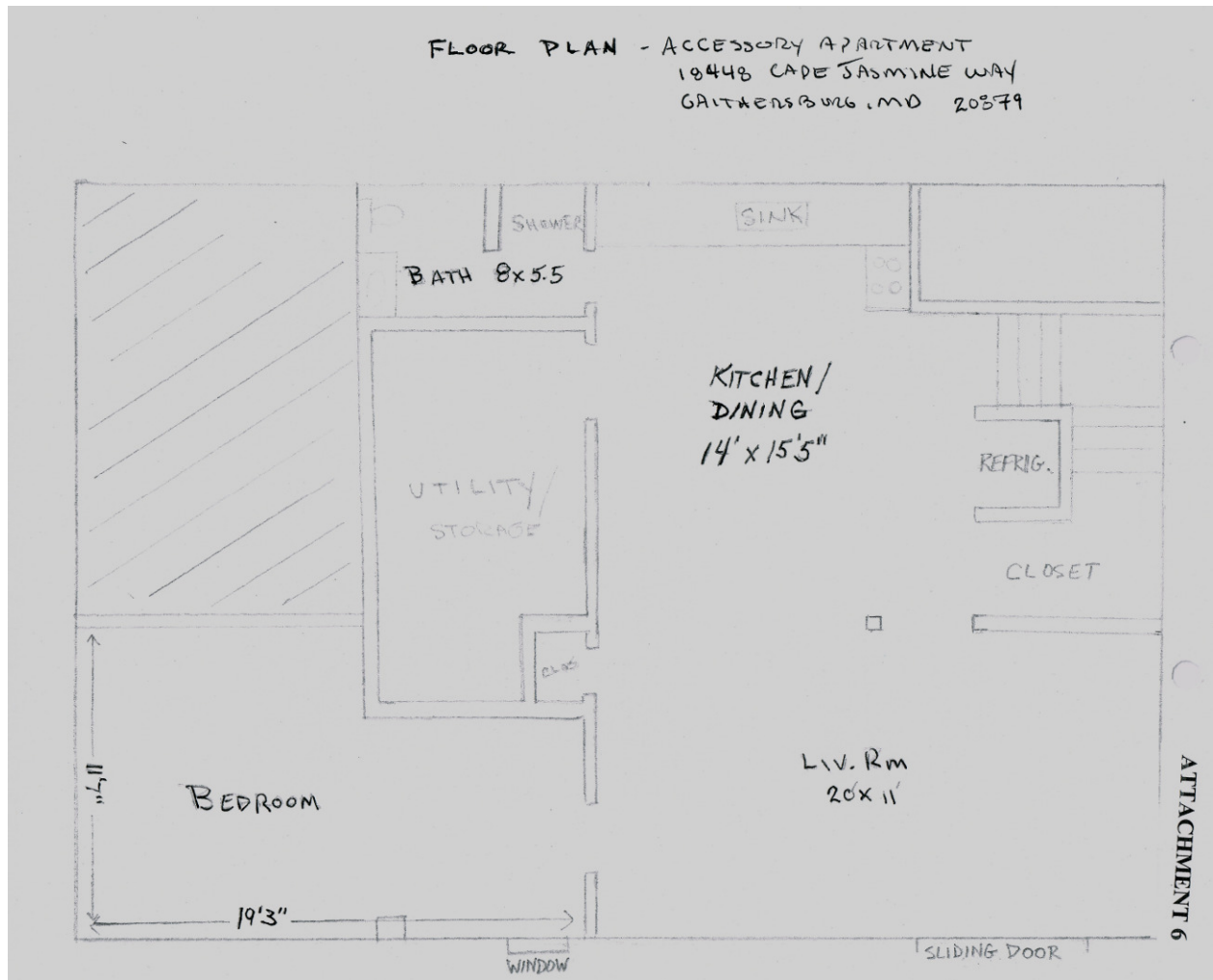
Mr. Jolly found that the total habitable area of the accessory apartment is approximately 798.67 square feet. Based on that fact, he concluded that it may be occupied by no more than 2 unrelated persons or a family of four. (Exhibit 16) Mr. Jolly re-inspected the property on February 7, 2012, and reported that the issues mentioned in his report (i.e., the fence and smoke detectors) had been resolved. Tr. 16. Mr. Jolly confirmed three off-street parking spaces (garage and driveway) and sufficient parking on the street. Mr. Jolly found that the accessory apartment parking (on and off street) was adequate and did not adversely affect the community or neighborhood. Tr. 17.

The apartment's habitable space includes a kitchen/dining room area, a bedroom, bathroom, living room and utility room. The apartment's Floor Plan is shown below

⁸ Technical Staff also approved, as shown on the revised Landscape and Lighting Plan (Exhibits 22 and 26), an exterior (motion sensor) light fixture on the right side of the dwelling to illuminate the walkway access to the apartment. Mr. Jolly testified that Petitioner will be required to obtain an electrical permit for the installation of the new light fixture. Tr. 19.

⁹ Mr. Jolly testified that he contacted Cynthia Gaffney from the rental license section of DHCA and confirmed that no fines were issued against Petitioner for failing to obtain the necessary approval for the special exception use and rental license prior to the apartment being rented and occupied. Tr. 21

(Exhibit 5):



The housing inspector testified that the main dwelling and accessory apartment were in immaculate condition and found that the accessory apartment did not detract from the residential neighborhood. Tr. 21.

E. Traffic Impacts

Technical Staff found that “the proposed special exception use satisfies the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests and will have no adverse impact on area roadways or nearby pedestrian facilities.”

Exhibit 13, p. 3. Technical Staff reported (Exhibit 13, p. 4):

The proposed accessory apartment within the existing single-family detached unit generates one additional or two total peak-hour vehicular trips within the weekday morning peak period (6:30 to 9:30 a.m.) and the evening peak period (4:00 to 7:00 p.m.). A traffic study is not required to satisfy LATR because the proposed land use generates fewer than 30 peak-hour trips within the weekday morning and evening peak periods.

PAMR mitigation is not needed because the “FY 12 Trip Mitigation Requirement” is 0% of the new vehicular peak-hour trips generated by a development located in the Montgomery Village/Airpark Policy Area.

Due to the small scale of the proposed use, the Hearing Examiner has no basis in this record to disagree with the finding of Technical Staff and therefore agrees that the accessory apartment satisfies the LATR and PAMR tests and will have no adverse impacts on the area roadways and pedestrian facilities. There being no evidence in the record to the contrary, the Hearing Examiner so finds.

F. Environmental Impacts

Petitioner does not propose any external changes to the site. Technical Staff advises that the property is exempt from the Forest Conservation Law. Exhibit 13, p. 4. Based on this evidence, the Hearing Examiner finds that Petitioner’s request will have no adverse environmental impacts.

G. Community Response

There was one pre-hearing letter of opposition dated September 24, 2011, from nearby neighborhood residents, Paul and Barbara Cencula, who reside at 18416 Cape Jasmine Way. Exhibit 12. Mr. and Mrs. Cencula expressed concerns that the granting of Petitioner’s special exception request “[t]o add an apartment in the middle of an area of single-family homes would run counter to the [Flower Hill] community plan.” Technical Staff explained that the

“PN zone is a planned unit development zone that allows for uses permitted as special exceptions, such as accessory apartments, in the R-90 zone.” Exhibit 13, p. 2.

In addition, Mr. and Mrs. Cencula expressed their concern that parking in the area was limited because most homes only had a one-car garage and as a result parked their vehicles on both sides of Cape Jasmine Way which they consider to be a narrow street. Technical Staff indicates that parking on the property is more than adequate (the garage and driveway can accommodate three vehicles), and on-street parking on both side of Cape Jasmine Way is sufficient and permitted. Exhibit 13 pp. 2-3. Mr. Jolly also confirmed there is sufficient on and off-street parking with no adverse impact to the neighborhood Tr. 17.

While it is clear that Mr. and Mrs. Cencula oppose an accessory apartment in their neighborhood, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment special exception, not whether the idea of having an accessory apartment in the neighborhood is unpopular. The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). The Hearing Examiner finds that the points raised by Mr. and Mrs. Cencula do not form a basis for denying the special exception petition.

III. SUMMARY OF THE HEARING

Petitioners, Donald C. and Nancy H. Nalle, testified at the public hearing in support of the petition. DHCA Housing Code Inspector, Mr. Wright Jolly also testified as to compliance with the Housing Code. There was no opposition at the hearing.

A. Petitioner’s Case

Petitioners Donald and Nancy Nalle:

Mr. Nalle executed an affidavit of posting (Exhibit 17) and submitted a copy of the

deed to the property (Exhibit 18). Petitioners adopted the findings and conclusions in the Technical Staff report (Exhibit 13) as their own evidence and agreed to comply with all the conditions set forth in the report. Tr. 6. Petitioners reviewed, accepted and have resolved the issues cited in the DHCA Housing Code Inspectors report (they repaired split-rail fence and installed hard-wired smoke detectors) dated January 30, 2012. Exhibit 14. Further, Petitioners acknowledged they understood and agreed with the housing inspector's finding that occupancy is to be limited to no more than 2 unrelated people or a family of four based on a total habitable space of 798.67 square feet. Exhibit 16. Both confirmed that the apartment is currently being rented and occupied by a married couple. Tr. 7.

Petitioners identified the site plan (Exhibit 4), landscape and lighting plan (Exhibit 6 (a)), photographs of the premises (Exhibit 9 (a)-(b)¹⁰) and the floor plan (Exhibit 5). Petitioners indicated that the site plan, landscape and lighting plan and photographs did not include or accurately reflect the newly installed walkway on the right side (view from street) and rear of the house to the accessory apartment entrance. Tr. 8-9. Petitioners identified the walkway on the site plan and landscape and lighting plan (noted in blue). Tr. 9.

Petitioners confirmed that the photograph of the rear of the house (Exhibit 9 (b)) accurately shows the location of the two existing multi-directional exterior lights one on each corner of the house. Petitioners indicated that the photographs taken by Mr. Jolly (Exhibits 21 (a)-(g)) show the repairs to the split-rail fence and the location and materials used for the walkway. Tr. 12.

Ms. Nalle identified the landscaping along the right side of the house as bushes and not trees. There is a light fixture, described as a carriage house fixture, on the front right

¹⁰ Mr. Nalle testified that these photographs of the front and rear of the house were taken the previous summer (2011). These pictures do not show the walkway because it was installed approximately one week before the February 9, 2012, hearing. Tr. 12 and 18.

corner of the house (garage) and two multidirectional flood light fixtures¹¹ on the left and right rear corners of the house. Tr. 9. These locations are circled on the landscape and lighting plan. Petitioners agreed to submit a revised landscape and lighting plan (Exhibit 26) to show the installed walkway and location of an additional residential exterior light fixture¹² on the right side of the dwelling which is necessary to illuminate the walkway. Tr. 18.

Petitioners and the tenants each have two vehicles. Petitioners do not use the single car garage and park two vehicles on the driveway. The tenant's park one vehicle on the street in front of the house and one vehicle across the street on the cul-de-sac (Cape Jasmine Court). Tr. 10-12.

Referring to the accessory apartment floor plan (Exhibit 5), Petitioners indicated that the hatched area (left side of plan) is not part of the apartment but represents the unexcavated area under the garage. Petitioners testified that the accessory apartment contains a kitchen/dining room area (refrigerator, sink and stove), a bedroom¹³, bathroom (sink, shower and commode), living room, utility room and closet with a door under the stairs to the main dwelling. Tr. 14-15.

B. Public Agency Testimony

Housing Code Inspector Wright Jolly:

Housing Code Inspector Wright Jolly testified that he inspected the property on January 12, 2012, and reported his findings in a memorandum dated January 30, 2012.

Exhibit 14. He reported that there were two occupants in the accessory apartment, the split

¹¹ Petitioners testified that they have not received any complaints from neighbors about their exterior lights. Tr. 10.

¹² Mr. Jolly testified that Petitioners would be required to obtain an electrical permit prior to installation of the exterior light on the right side of the house. Tr. 16. The Hearing Examiner advised the Petitioners that installation of this exterior light would be added as a condition of approval of the special exception petition. Tr. 22.

¹³ The Hearing Examiner advised Petitioner that the only place people can sleep in the accessory apartment is in the bedroom designated on the floor plan (Exhibit 5). Tr. 15.

rail fence was deteriorating and in disrepair, and the dwelling (the main and the apartment) lacked the necessary hard wired smoke detectors outside the sleeping areas. Mr. Jolly re-inspected the property on February 7, 2012, and found the issues (fence and smoke detectors) had been resolved. Tr. 16. He also confirmed with Cynthia Gaffney at the rental license section of DHCA that no fines were issued against the Petitioners for failure to obtain the necessary approval for the special exception use and rental license prior to rental and occupancy of the accessory apartment. Tr. 21-22.

During his initial inspection, Mr. Jolly recommended that Petitioners install a walkway with scenic slabs or pavers on the right side of the property to allow for access to the accessory apartment. Mr. Jolly stated that the walkway materials were safe and the quality of work was good. He noted that there was no light fixture on the right side of the dwelling and that the same would likely be required to illuminate the walkway. He testified that there were two exterior lights in the rear of the dwelling, one of which was located over the accessory apartment entrance. Tr.16-19.

Mr. Jolly indicated a one-car garage and space for two vehicles on the driveway. He also found “a sufficient amount of off-street parking on the street.” He also noted the on-street parking would not affect the community or neighborhood. Tr. 17. Mr. Jolly found that the total habitable area of the accessory apartment is approximately 798.67 square feet. Based on the square footage of the bedroom, he concluded that it may be occupied by no more than 2 unrelated persons or a family not to exceed 4 persons. (Exhibit 16); Tr. 17. Mr. Jolly commented that the house (main dwelling and accessory apartment) was in immaculate condition and does not “take anything away from the community.” Tr. 20.

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions. Exhibit 13.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the recommended conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code Section 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code Section 59-G-1.21. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects,

alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 13, pp. 5-6):

- (1) The existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit;
- (2) The provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code;
- (3) The provision of a separate entrance and sufficient lighting;
- (4) The provision of sufficient parking;
- (5) The existence of an additional household on the site;
- (6) The additional activity from that household, including potential for additional noise from that additional household.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an

additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found that there are no non-inherent adverse effects arising from the accessory apartment. In support of this conclusion, Technical Staff summarized the evidence as follows, (Exhibit 13, p. 6):

The accessory apartment in this application is approximately [798.67] square feet; is located in the basement of the existing single-family dwelling; has a separate entrance at the rear side of the dwelling, and the driveway extension can accommodate a total of three on-site parking spaces. For these reasons, Staff finds that the size, scale, and scope of the requested use are minimal, and that any noise, traffic, and disruption, or any other environmental impacts associated with the use would be slight. Thus, staff finds that there are no non-inherent adverse effects arising from the accessory apartment as detailed in the application.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects from the proposed use sufficient to warrant denial of the petition.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioners written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions.

§59-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the Planned Neighborhood Zone, pursuant to Code § 59-C-7.33.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the *Gaithersburg Vicinity Master Plan 1985 (as amended 1988 and 1990)*. For reasons set forth in Part II.C of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a single-family detached home located in the PN zone, is consistent with the goals and objectives of the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment is located in the basement and rear of an existing dwelling and will not require any significant external changes, other than the

installation of a residential exterior light on the right side of the house to illuminate the walkway to the accessory apartment. It therefore will maintain its residential character. There will be sufficient parking, both on- and off-street, and traffic conditions will not be affected adversely, according to Transportation Planning Staff. Technical Staff found no other similar uses (another accessory apartment) in the general neighborhood. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. Exhibit 13, p. 7.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the Hearing Examiner agrees and so finds that the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that “[d]ue to its residential nature, it is not expected that the use would cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the site.” Exhibit 13, p. 7.

Technical Staff also found the lighting on the property is “at an appropriate residential level.” Exhibit 13, p. 3. There will be a light fixture to the side of the front door to the main dwelling and one located above the garage door. There are two (2) multi-directional exterior lights located on each corner of the dwelling in the rear. A third exterior (motion sensor) will be located on the right side of the house to illuminate the walkway to the accessory apartment. Exhibit 26. The Hearing Examiner agrees with Technical Staff that the proposed lighting is residential in nature. Since the use will be indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The Hearing Examiner so finds.

(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Technical Staff found that there are no other accessory apartments in the general neighborhood and concluded that “since no new construction is proposed, the residential character of the neighborhood will not be altered.” Exhibit 13, p. 7. Because the proposed use is a residential use by definition, the special exception will not alter the predominantly residential nature of the area. The Hearing Examiner concurs with Technical Staff and finds that the proposed special exception will not increase the number, scope, or intensity of

special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that “[t]he subject site is already subdivided and will continue to be adequately served by public facilities.” Exhibit 13, p. 8. The evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (i) the determination of adequate public facilities for the site is not currently valid for an impact that is the same or greater than the special exception’s impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will*

be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Exhibit 13, p. 1. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (PAMR). As indicated in Part II. E. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. For the same reason, PAMR is also satisfied. Transportation Planning Staff also found “PAMR mitigation is not needed because the ‘FY 12 Trip Mitigation Requirement’ is 0% of the new vehicular peak-hour trips generated by a development located in the Montgomery Village/Airpark Policy Area.” Exhibit 13, p. 4. Therefore, the Hearing Examiner finds that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the “application satisfies transportation related requirements and will not reduce the safety of vehicular or pedestrian traffic.” Exhibit 13, p. 8. Based on the evidence of record, especially given the availability of off-street and on-street parking at the site and the limited number of additional trips generated by the special exception, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 13), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a*

separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of an existing single-family detached dwelling, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment will be located in the basement of an existing dwelling.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1986. Exhibit 13, p. 1. It therefore meets the “5 year old” requirement.

- (5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The use as proposed does not violate any of the provisions of this subsection; a requirement that that occupancy of both the main house and

the accessory apartment meet all Code requirements will be a condition of this approval.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through an existing separate exterior entrance (patio door) located in the rear of the dwelling. There will thus be no change to the residential appearance of the dwelling.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling, with the exception of an additional exterior light on the right side of the dwelling. Exhibit 13, p. 2. and Exhibit 26. The Hearing Examiner finds that this minor change, necessary for residential occupancy, will not affect the residential nature of the structure.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet. The 1,200 square feet limitation does not apply to an accessory apartment located in a separate existing accessory structure located on the same lot as the main dwelling. The maximum floor area for a separate existing accessory structure must be less than 50 percent of the total floor area of the main dwelling, or 2,500 square feet, whichever is less.*

Conclusion: The accessory apartment is subordinate to the main dwelling and under 1,200 square feet, as it occupies approximately 798.67 square feet of habitable space

in Petitioner's existing 1,760 square-foot home. Exhibit 16. The Hearing Examiner finds that the accessory apartment is subordinate to the main dwelling.

59-G § 2.00(b) *Ownership Requirements*

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioners will live in the upper level of the dwelling.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: According to the deed submitted into the record, Petitioners purchased the home in 2006. Exhibit 18. The one-year rule has therefore been satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioners will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: Petitioners submitted a deed dated August 23, 2006, evidencing joint ownership of the subject property. Exhibit 18. Therefore, the Hearing Examiner concludes that this condition has been met.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous*

tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable.

59-G § 2.00(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject property consists of a single lot that is approximately 7,800 square feet in size, and therefore satisfies this requirement. The Planned Neighborhood zone allows uses permitted by special exception in the R-90 zone. Accessory apartments are a special exception use in the R-90 zone and thus permitted as a special exception use in the PN zone, pursuant to Code § 59-C-7.33. Technical Staff found that the special exception satisfies the relevant development standards applicable to the R-90 zone, as shown (on the next page of this report) in the following table (Exhibit 13, pp. 4-5):

	<i>Required</i>	<i>Provided</i>
Minimum Lot Area (square feet)	9,000 sq. ft	*7,800 sq. ft.
Minimum lot width (feet) at front building line for 1-family detached dwelling	75 feet	*65 feet
Minimum lot width (feet) at existing street line	25 feet	65 feet
Minimum street setback (feet)	30 feet	32 feet
Minimum Setback from adjoining lot (feet)		
--One side	8 feet	9 feet
--Sum of both sides	25 feet	*21 feet (approx.)
--Rear	25 feet	Approx. 55 feet
Maximum Building Height (feet)	30 feet of 2.5 stories	2 stories
Maximum Coverage (%)	30%	Approx. 18%

*The standard lot size for a lot located in the R-90 zone is 9,000 square feet. This subdivision is an approved residential development that allows for variations in lot sizes and other development standards as noted above. Records show that the Planning Board approved the site plan for this project on April 21, 1983.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: As there are no similar or accessory apartment uses in the general neighborhood or immediate vicinity of the subject property, the Hearing Examiner finds that the petition will not create an excessive concentration of similar uses. Exhibit 13, p. 3.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

(i) More spaces are required to supplement on-street parking; or

(ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: Technical Staff concluded that the off-street parking (one car garage and asphalt driveway measuring 10'x 32') area will accommodate up to three (3) vehicles and similarly found there was sufficient on-street parking in front of the house and along Cape Jasmine Way. Exhibit 13, p. 3. The Hearing Examiner finds, therefore, that the minimum requirement of two (2) spaces has been met.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. D. of this Report, the Housing Code Inspector's report (Exhibits 14 and 16) notes certain issues, and recommends that occupation of the accessory apartment be limited to no more than four family members or two unrelated persons. As mentioned above, Petitioners have agreed to meet all conditions, and will make the repairs required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2825, which seeks a special exception for an accessory apartment to be located at 18448 Cape Jasmine Way, Gaithersburg, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must make the repairs needed to comply with the conditions set forth in the Memorandum of Wright Jolly, Housing Code Inspector, Division of Housing and Community Affairs (Exhibit 14):
 1. Install hard wired smoke detectors outside the sleeping areas in the basement and the main dwelling.
 2. Repair wood split rail fence.
3. Petitioners must install a motion sensor exterior light fixture (residential wattage) to be located on the right side of the dwelling as noted on the revised Landscape and Lighting Plan (Exhibit 26).
4. No more than four family members or two unrelated persons may reside in the accessory apartment;
5. The main dwelling unit must not be occupied by a family of unrelated persons;
6. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
7. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
8. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: March 26, 2012

Respectfully submitted,

Tammy J. CitaraManis
Hearing Examiner